

IN THE CIRCUIT COURT FOR THE
NINTH JUDICIAL CIRCUIT, IN
AND FOR ORANGE COUNTY,
FLORIDA

LYNDON HAMANN,

Petitioner,

v.

STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY & MOTOR
VEHICLES, DIVISION OF DRIVER
LICENSES,

Respondent.

CASE NO.: 2012-CA-1007-O

Writ No.: 12-07

Petition for Writ of Certiorari
from the Florida Department of
Highway Safety and Motor Vehicles,
Mary Varnadore, Hearing Officer.

Stuart I. Hyman, Esquire,
for Petitioner.

Richard M. Coln, Assistant General Counsel,
for Respondent.

BEFORE MIHOK, GRINCEWICZ, THORPE, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Lyndon Hamann (“Hamann” or “Petitioner”) seeks certiorari review of the Department of Highway Safety and Motor Vehicles’ (“Department” or “Respondent”) final order sustaining the suspension of his driver’s license for driving with an unlawful breath alcohol level. This Court has jurisdiction pursuant to section 322.2615(13), Florida Statutes and Florida Rule of Appellate Procedure 9.030(c)(3).

Facts and Procedural History

On July 1, 2011, Hamann was arrested for driving under the influence. Hamann provided breath test results of 0.227 and 0.227 and his license was suspended. He requested a formal review hearing pursuant to section 322.2615, Florida Statutes, and the hearings were held on August 3, 2011, October, 21, 2011, and December 2, 2011, and December 16, 2011.

At the hearing, Hamann attempted to introduce documents related to the 2002 approval study of the Intoxilyzer 8000; transcripts of the testimony of FDLE Inspector Roger Skipper from formal review hearings in other cases in 2006; a letter dated in 2006 from FDLE Custodian of Records Laura Barfield about the Intoxilyzer 8000 with software version 8100.26; numerous breath test results obtained from various Intoxilyzer 8000 machines using software 8100.26 and 8100.27 with testing dates in 2006 and 2007; subpoenas for FDLE Inspector Patrick Murphy, Roger Skipper, Laura Barfield, and FDLE Custodian of Records Jennifer Keegan that the hearing officer did not issue, and other documents. On December 27, 2011, the hearing officer entered a written order sustaining Petitioner's license suspension.

Standard of Review

“The duty of the circuit court on a certiorari review of an administrative agency is limited to three components: Whether procedural due process was followed, whether there was a departure from the essential requirements of law, and whether the administrative findings and judgment were supported by competent substantial evidence.” *Dep't of Highway Safety & Motor Vehicles v. Satter*, 643 So. 2d 692, 695 (Fla. 5th DCA 1994).

In a formal review of an administrative suspension, the burden of proof is on the State, through the Department. Where the driver license was suspended for driving with an unlawful

breath alcohol level, the hearing officer must find that the following elements have been established by a preponderance of the evidence:

1. Whether the arresting law enforcement officer had probable cause to believe that the person was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or controlled substances.
2. Whether the person whose license was suspended had an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher as provided in § 316.193.

§ 322.2615(7)(a), Fla. Stat. (2011).

Analysis

In the Petition for Writ of Certiorari, Hamann argues that: 1) the hearing officer deprived him of due process of law when his license suspension was not set aside due to the failure of the hearing officer to issue subpoenas for Patrick Murphy, Roger Skipper, Jennifer Keegan and Laura Barfield; 2) the breath test results were not properly approved because they were obtained by use of an unapproved breath testing machine and provided scientifically unreliable results; 3) the breath test results were inadmissible due to the failure of the record to contain the annual inspection report; 4) the Intoxilyzer 8000 was improperly evaluated for approval; and 5) the breath test results were inadmissible due to the officer's failure to conduct a proper 20 minute observation.

This Court denied the Petitions raising arguments (1)- (4) in *Klinker v. Dep't of Highway Safety & Motor Vehicles*, 2010-CA-19788, Writ 10-70 (Fla. 9th Cir. Ct. Sept. 10, 2012) and *Morrow v. Dep't of Highway Safety & Motor Vehicles*, 19 Fla. L. Weekly Supp. 704a (Fla. 9th Cir. Ct. Feb. 27, 2012). For the reasons stated in *Klinker* and *Morrow*, the Court finds that

Petitioner was not deprived of due process and the hearing officer properly admitted the breath test results.

V. Failure to Conduct Proper 20 Minute Observation

Hamann argues that Officer Shawn Meadows made no attempt to concentrate on him during the 20 minute observation period prior to the breath test and during the time he prepared the breath testing machine. He claims the officer was seated ten feet away during the 20 minute observation period, was writing reports, looking at computers, and communicating with other officers. He also claims while in the breath testing room, Officer Meadows worked on the breath testing machine, filled out paperwork, and repeatedly turned his back on him. He argues that the breath test results should not have been admitted because he was not observed for 20 minutes prior to the breath test as required by Florida Administrative Code, Rule 11D-8.

Florida Administrative Code 11D-8.007(3) states:

The breath test operator, agency inspector, arresting officer, or person designated by the permit holder shall reasonably ensure that the subject has not taken anything by mouth or has not regurgitated for at least 20 minutes before administering the test. This provision shall not be construed to otherwise require an additional 20-minute observation period before the administering of a subsequent sample.

Continuous face to face observation is not required to comply with Rule 11D-8.007. *Kaiser v. State*, 609 So. 2d 768 (Fla. 2d DCA 1992). The video demonstrates that Officer Meadows was in a position to observe Hamann to ensure that he had not placed anything in his mouth or regurgitated.

Hamann entered the booking room and was seated on a bench directly in front and within clear view of Officer Meadows and what appears to be the arresting officer, Officer Sharon Wagener. During the 20 minute time period while observing Hamann, Officer Meadows worked on paper work, used the computer, and spoke to Officer Wagener. Only Officers Wagener and

Meadows were in the booking room during this time period. The video demonstrates that at least 20 minutes elapsed from the time Officer Meadows began his observation in the booking room until Hamann was escorted into the breath testing room. In the breath testing room, Hamann was within arm's reach and within view of Officer Meadows. Officer Meadows explained the process and conducted the test. The video shows that Hamann does not place anything into his mouth or regurgitate during this entire process.

Based on the evidence submitted at the hearing, the hearing officer properly determined that Officer Meadows reasonably ensured that Hamann had not taken anything by mouth or regurgitated for at least 20 minutes before administering the test. Therefore, the Department substantially complied with Rule 11D-8.007.

In conclusion, Petitioner was not deprived of due process, the hearing officer did not depart from the essential requirements of law and there was competent substantial evidence to support the hearing officer's findings.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that The Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 18th day of October, 2012.

/S/ _____
A. THOMAS MIHOK
Circuit Judge

/S/ _____
DONALD E. GRINCEWICZ
Circuit Judge

/S/ _____
JANET C. THORPE
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: **Stuart I. Hyman, Esq.**, Stuart I. Hyman, P.A., 1520 East Amelia St., Orlando, Florida 32803 and to **Richard M. Coln, Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, P.O. Box 570066, Orlando, Florida 32857 on this 18th day of October, 2012.

/S/ _____
Judicial Assistant